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No. 82-2265

IN THE

SUPREME COURT OF THE UNITED STATES

June Term, 1982

ROWAN P. KELLY, JR.,

Petitioner

v.

WARMINSTER TOWNSHIP BOARD OF SUPERVISORS, FRANCIS J. MCKAY, H. CHARLES FORD, SR., RICHARD G. LEDOUX, ANDREW L. WARREN, THOMAS C. HOLTER and CONRAD YEAGER

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should review a judgment entered in favor of the respondents in the court below on petitioner's claimed denial of equal protection where the record reflects that petitioner's claim in the District Court was barred by the doctrines of collateral estoppel and *res judicata*, where the District Court expressly found that petitioner's claimed denial of equal protection was frivolous and where the actions alleged to have been violative of petitioner's equal protection rights were not taken by the respondents herein.

TABLE OF CONTENTS

	Page
Statement of Questions Presented for Review	1
Table of Authorities	iii
Opinions and Judgments Below	1
Grounds for Jurisdiction	2
Constitutional Provisions and Statutes Involved ..	2
Statement of the Case	6
Summary of Argument	11
Argument	11
Conclusion	18

TABLE OF AUTHORITIES

Cases:	Page
Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604 (1970)	12
Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980)	16
Baker v. McCollan, 443 U.S. 137, 142, 99 S.Ct. 2689, 2694 (1979)	13
Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978) *rev'd in part on other grounds sub. nom. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171 (1979)	13
Kelly v. Warminster Twp. Bd. of Supervisors, 512 F. Supp. 658 (E.D. Pa. 1981)	1, 6, 10, 12, 14
Kelly v. Warminster Twp. Bd. of Supervisors, 404 A.2d 731 (Pa. Cmwlth. 1979)	2, 6, 8
Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974)	17
Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-95, 98 S.Ct. 2018, 2035-2038 (1978)	13
Red Fox v. Red Fox, 564 F.2d 361, 363 (9th Cir. 1977)	17
Rizzo v. Goode, 423 U.S. 362, 371, 96 S.Ct. 598, 604 (1976)	13
Robbins v. District Court, 592 F.2d 1015 (8th Cir. 1979)	17
Roy v. Jones, 484 F.2d 96, 98 (3d Cir. 1973)	17
School Crossing Guards Assn. v. City of New York, Inc., 438 F. Supp. 1275, 1282 (S.D.N.Y. 1977)	15
Spence v. Latting, 512 F.2d 93 (10th Cir. 1974) *cert. denied* 423 U.S. 896, 96 S.Ct. 198 (1976)	17

TABLE OF AUTHORITIES *(continued)*

Cases:	Page
U.S. v. Smith, 464 F.2d 194 (10th Cir. 1972) *cert. denied* 409 U.S. 1066, 93 S.Ct. 566 (1973)	15
United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 101 S.Ct. 453 (1980)	14
United States Constitution:	
Amendment XIV	15
Amendment XIV, §1	2
Statutes:	
28 U.S.C. §1257(2)	18
28 U.S.C. §1331	6
28 U.S.C. §1454(sic)	6
42 U.S.C. §1983	3, 12, 13, 17
53 Pa. Purdon's Stat. §811 *et. seq.*	8, 9
53 Pa. Purdon's Stat. §814	3, 14
53 Pa. Purdon's Stat. §815	4
53 Pa. Purdon's Stat. §45101 *et. seq.*	9
53 Pa. Purdon's Stat. §45201-45235	15
53 Pa. Purdon's Stat. §46191	4
53 Pa. Purdon's Stat. §55201-219	15
53 Pa. Purdon's Stat. §65201-230	15
Rules:	
Supreme Court Rule 17	11
Supreme Court Rule 17.i	11
Federal Rules of Civil Procedure 12(b)	7

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OPINIONS AND JUDGMENTS BELOW

This petition arises from an unreported judgment order entered by the United States Court of Appeals for the Third Circuit. The judgment order affirmed a summary judgment by the United States District Court for the Eastern District of Pennsylvania, *Kelly v. Warminster Twp. Board of Supervisors*, 512 F. Supp. 658 (E. D. Pa. 1981).

The District Court's conclusion that virtually all of plaintiff's claim was barred by the doctrine of collateral estoppel was predicated on a prior opinion of the Commonwealth Court of Pennsylvania, *Kelly v. Warminster Twp. Board of Supervisors*, 404 A.2d 731 (Pa. Cmwlth. 1979). Petition for allowance of appeal to the Pennsylvania Supreme Court from the Pennsylvania Commonwealth's Court opinion was denied by the Pennsylvania Supreme Court in an unreported order on January 3, 1980.

GROUNDS FOR JURISDICTION

Respondents, although disputing portions of the procedural history set forth in this portion of the petition for writ of certiorari, nevertheless concede that jurisdiction of the Supreme Court is properly invoked in that the petition for writ of certiorari is being filed within ninety (90) days of the order of the Court of Appeals denying petitioner's request for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. United States Constitution, Amendment XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

C. 53 Pa. Purdon's Stat. §814 (Supp. 1981-82)

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed within five days, and may be continued by the appointing party for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be recorded officially against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

D. 53 Pa. Purdon's Stat. §815 (Supp. 1981-82)

The suspended or dismissed employee shall have the right to appeal to the Court of Common Pleas of the county in which he was employed.

E. Pa. 53 Purdon's Stat. §46191 (Supp. 1981-82)

If the person suspended, removed or reduced in rank shall demand a hearing by the [Civil Service Commission], the demand shall be made to the Commission. Such person may make written answers to any charges filed against him not later than the day fixed for hearing. The Commission shall grant him a hearing which shall be held within a period of ten days from the filing of charges in writing, unless continued by the Commission for cause at the request of the Council or the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The Council may suspend any such person, without pay, pending the determination of the charges against him, but in the event the Commission fails to uphold the charges, then the person sought to be suspended, removed or demoted shall be reinstated with full pay for the period during which he was suspended, removed or demoted and no charges shall be officially recorded against his record. A stenographic record of all testimony taken at such hearings shall be filed with and preserved by the Commission which records shall be sealed and not be available for public inspection in the event the charges are dismissed.

All parties concerned shall have immediate right of appeal to the Court of Common Pleas of the county, and the case shall there be determined as the Court deems proper. No order of suspension made by the Commission shall be for a longer period than one year. Such appeal shall be taken within sixty (60) days from the date of entry by the Commission of its final order and shall be by petition. Upon such appeal being taken and docketed,

the Court of Common Pleas shall fix a day for a hearing and shall proceed to hear the appeal on the original record and such additional proof or testimony as the parties concerned may desire to offer in evidence. The decision of the Court affirming or revising the decision of the Commission shall be final, and the employee shall be suspended, discharged, demoted or reinstated in accordance with the order of Court.

The Council and the person sought to be suspended, removed or demoted, shall at all times have the right to employ counsel before the Commission and upon appeal to the Court of Common Pleas.

STATEMENT OF THE CASE

A. Course of Proceedings

On September 26, 1978, petitioner instituted this action in the District Court alleging civil rights jurisdiction pursuant to 28 U.S.C. §1454(sic) and §1331. Petitioner, formerly the Chief of Police of Warminster Township, Pennsylvania, generally averred a deprivation of his civil rights through the procedures utilized by the township and its board of supervisors in terminating plaintiff's employment. The termination was effected on September 27, 1977, and confirmed following a five day public evidentiary hearing after which petitioner was found responsible for 29 instances of conduct unbecoming an officer. The specific violations of which petitioner was convicted are set forth in the opinion of the District Court, 512 F. Supp. at 658 n.6, and include physical and verbal assault on a district justice, taking improper liberties with female employees of the police department, including soliciting an unnatural sex act from one female employee, and being intoxicated while on duty.

On December 22, 1978, respondents moved the District Court to dismiss or stay all proceedings pending the resolution of petitioner's appeal from the Court of Common Pleas to the Commonwealth Court of Pennsylvania. That motion was granted by the District Court on March 30, 1979, and all proceedings in the District Court were stayed pending resolution of the state court proceedings. On July 26, 1979, the Commonwealth Court entered an opinion affirming the Court of Common Pleas in all respects [*Kelly v. Warminster Twp. Board of Supervisors*, 404 A.2d 731 (Pa. Cmwlth. 1979)] and petition for allowance of appeal was denied by the Pennsylvania Supreme Court on January 3, 1980, in an unreported order.

Thereafter, respondents filed a motion to dismiss in the District Court arguing the applicability of the doc-

trines of *res judicata* and collateral estoppel with respect to each of petitioner's contentions. Oral argument was heard by the District Court and, having chosen to review the state court record, the District Court elected to treat the defendants' motion as a motion for summary judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. On March 18, 1981, the District Court entered a memorandum and order finding that petitioner's causes of action were not barred by the doctrine of *res judicata*, but that, with the exception of the claimed denial of equal protection, the causes of action were barred by the doctrine of collateral estoppel. The District Court further held that, taking all of petitioner's allegations of fact as true, he had failed to state an equal protection claim upon which relief could be granted against the named respondents. Accordingly, the complaint was dismissed.

Petitioner appealed to the United States Court of Appeals for the Third Circuit. On February 25, 1982, that court entered a judgment order affirming the District Court's dismissal of petitioner's complaint and on March 23, 1982, the Court of Appeals entered an order denying petitioner's request for rehearing. This Petition for Certiorari followed.

B. Statement of the Facts

Following five days of hearings which consumed some seven hundred and fifty pages of transcript, on October 20, 1976, the Board of Supervisors of Warminster Township, Pennsylvania, voted to affirm its previous decision to dismiss petitioner from his position as Chief of Police of the Warminster Township police force. The decision was made following receipt of evidence establishing 29 instances of conduct unbecoming an officer, the most blatant of which include: (1) a verbal and physical assault on a district justice; (2) a separate assault on one George McAllister; (3) numerous instances of sexual advances to female employees and others including a sex-

ual advance to one Joan Ault, unzipping the jacket of one Gloria Smith, kissing one Judy Hufnell against her wishes and soliciting an unnatural sex act from a female employee of the department; (4) indulging in alcoholic beverages to the point of intoxication while on duty; (5) issuing a general order without the approval of the Board of Supervisors directing police officers not to enforce Sunday closing laws; and (6) directing a police dispatcher during a period of increased tension in the township to advise police officers to "let them fight and we will arrest the winners." Despite being given opportunity to do so, petitioner, upon the advice of counsel, did not testify at the Board of Supervisors hearings apparently having determined that he would automatically have the right to do so in the Court of Common Pleas. The Court of Common Pleas chose only to receive any testimony which petitioner had been precluded from presenting to the Board of Supervisors and this determination was upheld by the Pennsylvania Commonwealth Court (404 A.2d at 733-34).

The Bucks County Court of Common Pleas affirmed the determination of the Board of Supervisors. With the exception of the equal protection claim that Court directly addressed each constitutional contention made by petitioner in the instant lawsuit including the allegations that the Board of Supervisors which voted to fire the plaintiff was biased and prejudiced, that petitioner was denied due process by not being given written statements from witnesses testifying against him, that he was dismissed without being advised of the allegations against him, that his dismissal constituted criminal punishment without the benefit of constitutional safeguards, and that the Police Tenure Act, 53 Pa. Purdon's Stat. §811 *et. seq.* (Supp. 1981-82), unconstitutionally commingled prosecutorial and adjudicative functions. Similarly, the Pennsylvania Commonwealth Court had presented to it each of the just recited claims and also affirmed petitioner's dismissal.

Following the entry of the Court of Common Pleas order affirming petitioner's dismissal and while the matter was pending on appeal in the Commonwealth Court, petitioner commenced the instant action in the Eastern District of Pennsylvania. Significantly, at no time during the proceedings in the Court of Common Pleas did petitioner ever advise that court of his intention to commence the federal action or of any intention on his part to preserve his equal protection claim or any other constitutional contention for adjudication by the federal courts.

Following institution of the federal court litigation, respondents obtained a stay of proceedings in order to permit resolution of the state court appeal which involved the same issues as petitioner was raising in the federal court. The District Court granted the stay and in due course the Court of Common Pleas judgment was affirmed by the Commonwealth Court and the Pennsylvania Supreme Court denied review.

Thereafter, respondents re-commenced activity in the District Court by filing a motion to dismiss predicated upon principles of *res judicata* and collateral estoppel and arguing that every issue which petitioner raised in the District Court proceeding had either been or clearly could have been raised in state court and was, therefore, to be considered resolved as between the parties and their privies. The District Court rejected the *res judicata* arguments but accepted the collateral estoppel arguments with respect to each issue except that of the claimed denial of equal protection. The District Court's opinion concluded, however, that the equal protection claim was also subject to dismissal because the disparities claimed by petitioner between the Police Tenure Act, 53 Pa. Purdon's Stat. §811 *et. seq.*, under which petitioner was discharged, and the Pennsylvania Borough Code, 53 Pa. Purdon's Stat. §45101 *et. seq.*, which petitioner claimed gave police officers in a similar situation more substantial procedural rights, were clearly per-

missible under the "rational relationship" standard of scrutiny applicable to the two laws, *Kelly v. Warminster Twp. Bd. of Supervisors*, 512 F. Supp. 658 (E.D. Pa. 1981).

On petitioner's appeal to the Court of Appeals respondents renewed their argument that the doctrine of *res judicata* also barred petitioner's equal protection argument and, in the alternative, urged acceptance of the District Court's conclusion that petitioner's equal protection contentions were frivolous. The Court of Appeals entered an order affirming the order of the District Court dismissing petitioner's Complaint.

SUMMARY OF ARGUMENT

This case contains none of the factors mentioned in Supreme Court Rule 17 pertaining to the exercise of discretion in the granting of a writ of certiorari. The decisions of the District Court and of the Court of Appeals do not vary from settled authority nor do the matters include any important question of federal law. On the contrary, the order of the Court of Appeals dismissing the petitioner's appeal whether read as an adoption of the District Court's conclusion that the equal protection claim was frivolous or as adoption of respondent's contention that consideration of the equal protection claim is barred by the doctrine of *res judicata* is fully in keeping with the decisions of this Court and of the various courts of appeals.

ARGUMENT

I. THE PETITIONER'S CLAIMED DENIAL OF EQUAL PROTECTION IS FRIVOLOUS AND WAS CORRECTLY DISMISSED BY THE LOWER COURTS.

Rule 17.1 of the Rules of this Court provides in relevant part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

The Petition for Writ of Certiorari filed herein reflects no such reason. Indeed, not only was petitioner's claim of denial of equal protection rejected by the courts below but the District Court did not hesitate to label it as frivolous.

Petitioner's equal protection complaints can be summarized as follows:

(a) Police officers employed by boroughs within the Commonwealth of Pennsylvania are enti-

> tled to a hearing before a civil service commission before discharge by the Board of Supervisors is finalized while police employees of a second class township are afforded only a hearing in front of the Board of Supervisors which originally ordered the discharge; and (b) on appeal to the Court of Common Pleas the court is allegedly required to hear all evidence which a dismissed borough policeman wishes to present while the same court may limit the supplementing of the evidentiary record in the case of a discharged township police officer. The claimed denial fails for two reasons.

First, assuming, *arguendo*, that there were any merit to the petitioner's contention that he was treated unequally, his claim against these respondents would still fail for the reasons set forth by the District Court:

> The equal protection of the laws issue, discussed *infra*, is not material to the named defendants because the Pennsylvania legislature and not the township prescribes the applicable judicial review procedures for administrative hearings. Even assuming that the acts of the defendants involved the equal protection clause, taking the allegations of plaintiff as true, plaintiff has not stated an equal protection claim upon which relief may be granted.

512 F. Supp. at 666n.12.

In *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604 (1970), this Court set forth the prerequisites for a recovery under §1983:

> The terms of §1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove *that the defendant has deprived him of a right* secured by the "Constitution and laws" of the United States. Second, the plaintiff must show *that the defendant* deprived him of this constitutional right "under color of any statute, ordinance, regula-

tion, custom or usage, of any state or territory.". . . . (Footnote omitted; emphasis supplied.)

Adickes has given rise to a plethora of opinions both from this Court and from the courts of appeals requiring direct participation on the part of the named defendant in the alleged violation of civil rights. *See, e.g., Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-95, 98 S.Ct. 2018, 2035-2038 (1978) (Municipality liable only if it causes harm through official policy or custom); *Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 604 (1976) (Liability of supervisory police officials attaches under §1983 only if their actions proximately caused plaintiff's harm); *Baker v. McCollan*, 443 U.S. 137, 142, 99 S.Ct. 2689, 2694 (1979) (Public official liable under §1983 only "if he causes the plaintiff to be subjected to deprivation of his constitutional rights"); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1978) *rev'd in part on other grounds sub. nom. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171 (1979) (Executive directors and members of regional planning agency not responsible for alleged unconstitutional inverse condemnation of plaintiff's property where enabling legislation did not provide such defendants with the power to condemn.)

The District Court's conclusion, affirmed by the Court of Appeals, that petitioner's failure to allege any personal involvement on the part of these defendants is fatal to his claimed denial of equal protection is entirely supported by the record and the cases and does not warrant review by this Court.

The claimed denial of equal protection suffered by the petitioner is equally lacking in merit. The claim fails because petitioner's treatment was, in fact, not significantly different than that of a discharged borough policeman and because, to the extent that differences did exist, they were rationally related to the Commonwealth's legitimate governmental interests in permitting

local municipalities to determine in what form and at what expense their local government will exist.

The District Court having reviewed the entire state court record concluded, as had the Pennsylvania state courts, that petitioner had been afforded a full opportunity for hearing before the Board of Supervisors together with meaningful appellate review. 512 F. Supp. at 670. The Police Tenure Act pursuant to which petitioner was removed from office, 53 Pa. Purdon's Stat. §814 (Supp. 1981-82), provided petitioner with full procedural due process, i.e., the right to be heard, notice of the hearing, the right to present evidence and challenge evidence presented against him and the right to counsel. Petitioner availed himself of each of those rights and, in fact, petitioner's hearing before the Board of Supervisors lasted for five days and consumed some seven hundred and fifty pages of transcript. Had he been a borough policeman, the Constitution would have demanded no more. When reviewed in the light of the actual opportunities to be heard afforded plaintiff in this lawsuit as reflected by the state court record, it is clear that plaintiff sustained no denial of equal protection.

Even if the differences in procedure utilized with respect to borough police officers were constitutionally relevant, it is clear that such differences pass the "rational relationship" test applicable here. Since the differences do not involve either "suspect classification" nor impinge on "fundamental interests", they violate equal protection only if they bear no rational relationship to a legitimate state purpose. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453 (1980). The District Court opinion reflected clear awareness of that principle and properly applied it in concluding that petitioner's claim was meritless. No compelling reason for this Court to review that determination exists and none is suggested in the Petition for Writ of Certiorari.

Certainly, a state is permitted to leave to local municipalities the right to determine the form of government which they choose to adopt and, concomitantly, the expense which will necessarily follow. Obviously, the creation of a separate civil service commission, as required by the borough code, entails certain additional expenses and bureaucratic structures which, depending on the needs of a given area, may be more or less desirable in particular municipalities. Thus, municipalities in Pennsylvania are given the right to declare themselves first or second class townships or boroughs understanding the substantive and procedural governmental implications which necessarily follow. *See, e.g.*, 53 Pa. Purdon's Stat. §55201-55219 (Supp. 1981-82) (Proceedings to establish first class township); 53 Pa. Purdon's Stat. §65201-65230 (Supp. 1981-82) (Proceedings to establish second class township); 53 Pa. Purdon's Stat. §45201-45235 (Supp. 1981-82) (Proceedings to establish borough).

So long as any police officer is afforded rights sufficient to comport with the requirements of due process, there can be no doubt that the state, in order to further other goals, may adjust the procedural forms in which the due process is afforded. One such legitimate goal is to ensure that each municipality has available to it the form of government best suited to its individual needs. Equal protection requires that persons similarly situated with respect to challenged governmental action be similarly treated. *School Crossing Guards Assn. v. City of New York, Inc.*, 438 F. Supp. 1275, 1282 (S.D.N.Y. 1977). The Fourteenth Amendment condemns arbitrary and invidious discrimination; it does not require exact equality. *U.S. v. Smith*, 464 F.2d 194 (10th Cir., 1972) *cert. denied* 409 U.S. 1066, 93 S.Ct. 566 (1973).

The Commonwealth possesses a legitimate governmental interest in providing varying forms of local government in order to permit municipalities to select the one most suited to their needs and financial resources.

Nothing in the equal protection clause precludes that legislative determination.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE EQUAL PROTECTION CLAIM BECAUSE IT IS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Although the District Court rejected respondents' contention that the equal protection claim is barred by the doctrine of *res judicata*, analysis of this Court's opinions and of numerous opinions from the courts of appeals requires a conclusion that the claim was barred in the federal court and, therefore, is not appropriately available for review by this Court.

In *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411 (1980), this Court noted:

> The federal courts have traditionally adhered to the related doctrines of *res judicata* and collateral estoppel. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or *could have been raised in that action*. (Citations omitted; emphasis supplied.)

449 U.S. at 94, 101 S. Ct. at 414.

It is entirely clear that petitioner had a full opportunity to present any constitutional claims he desired to the state courts, witness his plenary litigation of the arguments that he was deprived procedural due process through the unconstitutional commingling of the prosecutorial and adjudicative function. Moreover, petitioner made no attempt in the Court of Common Pleas to reserve any federal claims for proceedings at a later date in the federal system. In such a situation, it is clear that all of petitioner's contentions which could have been raised in the state court proceedings are barred from further litigation. Such a holding would have been in accor-

dance with opinions of at least five different circuit courts of appeals. *See, e.g., Roy v. Jones*, 484 F.2d 96, 98 (3d Cir., 1973); *Red Fox v. Red Fox*, 564 F.2d 361, 363 (9th Cir., 1977); *Spence v. Latting*, 512 F.2d 93 (10th Cir. 1974) *cert. denied* 423 U.S. 896, 96 S. Ct. 198 (1976); *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974); *Robbins v. District Court*, 592 F.2d 1015 (8th Cir. 1979).

In *Robbins*, plaintiffs had seen their parental rights terminated by the District Court of Worth County, Iowa, after a hearing produced an adjudication that the plaintiffs were unfit as parents. After the District Court's determination was affirmed by the Iowa Supreme Court, plaintiffs instituted a §1983 action alleging several constitutional deprivations, only one of which had been raised and resolved by the Iowa Supreme Court. Nevertheless, the Eighth Circuit refused to hear the remaining constitutional issues finding them precluded by the doctrine of *res judicata*. In holding that doctrine applicable, the Eighth Circuit applied a test for identity of causes of action which is equally applicable to the instant litigation:

> It is equally apparent that the causes of action in each proceeding are the same. Appellants argued in state court as they do here that their parental rights were unjustly and unconstitutionally terminated. Thus their §1983 action is based on the same nucleus of operative fact before the Iowa courts. Appellants had the opportunity to raise these issues before the Iowa Supreme Court and having failed to do so cannot now attempt to circumvent the doctrine of claim preclusion by merely alleging a different theory of recovery where the actions arise out of the same transaction. (Citations omitted.)

592 F.2d at 1018.

Thus, not only is the petitioner's claimed denial of equal protection without merit, he was precluded from

raising it in the lower courts by the doctrine of *res judicata*. Thus, the claim is not available for review in this Court. Of course, petitioner had available to him the option of direct appeal to this Court at the time that the Pennsylvania Supreme Court refused allowance of appeal, 28 U.S.C. §1257(2) (Supp. 1982), but elected to forego that option.

CONCLUSION

For all of the foregoing reasons, it is submitted that the order of the Court of Appeals affirming the dismissal of the petitioner's complaint does not warrent review by this Court on writ of certiorari and it is requested that the petition be denied.

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